# Attachment B

STATE OF MICHIGAN
IN THE COURT OF APPEALS

AT&T CORPORATION,

Plaintiff-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee,

and

WESTPHALIA TELEPHONE COMPANY and
GREAT LAKES COMNET, INC.,

Defendants-Appellees.
_____/

Docket No. **326100**

(MPSC Case No. U-17619)

**ANSWER OF DEFENDANT-APPELLEE
MICHIGAN PUBLIC SERVICE COMMISSION
TO APPELLANT AT&T'S MOTION FOR STAY PENDING APPEAL**

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

Page

### Cases



### Statutes

**Rules**



**Regulations**

## INTRODUCTION

On May 12, 2014, Great Lakes Comnet, Inc. ("GLC") and Westphalia Telephone Company ("WTC") (GLC and WTC will be collectively referred to as "Complainants") filed their Application and Complaint in Michigan Public Service Commission ("MPSC" or "Commission") Case No. U-17619, seeking an order from the Commission finding that AT&T has violated Complainants' respective intrastate tariffs and breached its contract for regulated services under the tariffs. The Complainants requested the Commission to issue an order (i) requiring AT&T to immediately pay Complainants all amounts past due and owing for switched access services, together with all charges for past due amounts and late charges; (ii) that AT&T cease and desist from failing to comply with and violating the intrastate tariffs; and (iii) that AT&T pay Complainants for all switched access services that AT&T uses in accordance with the Complainants' respective intrastate tariffs on an going-forward basis, and (iv) grant the Complainants other relief as appropriate. AT&T filed counterclaims where it asserted a violation of MCL 484.2310(2) by GLC, and violation of that statute by WTC.

The Commission filtered through the jargon, the endless acronyms, and the increasingly complex technical testimony that characterized this case and sided with the Complainants.[1] In the end, the Commission ordered AT&T to pay

[1] Party characterization was an important part of the underlying case. An interexchange carrier ("IXC") is a long distance telephone company. A local exchange carrier ("LEC"), whether incumbent ("ILEC") or competitive ("CLEC"), is a local telephone company. A competitive access provider ("CAP") operates a private network on a wholesale basis that links IXCs to LECs, acting as an intermediary in transporting a call. ILECs and CLECs may also provide intermediate transport.

Complainants $4,300,000. MPSC Order, January 27, 2015, pg. 41. AT&T subsequently filed a motion for stay pending appeal, asking the Commission, pursuant to Section 203(16) of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq., to stay the January 27 order pending final disposition of AT&T's appeal of right from that order. MCL 484.2203(16) provides:

> Upon the filing of a motion for stay, the commission may, on terms as it considers just, stay the effect or enforcement of an order, except an order regarding rates or cost studies. A motion for stay, including a request for setting the amount of any appeal bond, are governed by the provisions for obtaining a stay of a civil action set forth in R 7.209 of the Michigan court rules. The commission shall decide a motion for stay within 10 days from the date the motion is filed with the commission.

AT&T's motion for stay was denied by the Commission because it did not address the four criteria that the Commission considers when determining whether a stay is just and appropriate. MPSC Order, February 12, 2015, pg. 5.

## ARGUMENT

### I. AT&T has not met the factors for a stay.

AT&T argues that the MPSC applied the wrong rule, relying on MCR 7.119 instead of MCR 7.209. AT&T fails to recognize, however, that exercising the power to stay an order is a matter within the Commission's discretion. The Commission may grant a motion to stay upon terms that it considers just and appropriate. MCL 484.2203(16); MCL 24.304(1); see also, MCR 7.208(F). This Court possesses

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The Commission correctly defined WTC as a rural incumbent local exchange carrier ("rural ILEC") and GLC as a CAP. MPSC Order, January 27, 2015, pg. 3. This characterization was crucial because the FCC's benchmark for CLEC switched access rates do not apply to the charges of a non-CLEC. 47 CFR 61.26 et al.

the same level of discretion when considering a motion for stay. MCR 7.209 is a broad grant of authority and allows this Court to stay the enforcement of any judgment or order of a trial court *on the terms it deems just.* Although MCR 7.119 specifically governs an appeal to the circuit court from an agency decision, the rule provides four relevant criteria for determining when issuing a stay would be just and appropriate.

In determining whether a stay was just and appropriate in this case, the Commission applied the four criteria listed in MCR 7.119(E):

> (1) the moving party will suffer irreparable injury if a stay is not granted;
>
> (2) the moving party made a strong showing that it is likely to prevail on the merits of its appeal;
>
> (3) the public interest will not be harmed if a stay is granted; and
>
> (4) the harm to the moving party if a stay is not granted will outweigh the harm to the other parties to the proceeding if a stay is granted.

The Commission has regularly applied the MCR 7.119 four factors when considering stay requests. (See: June 29, 2004 order in Case No. U-13764; April 12, 2011 order in Case No. U-13764, and *In re Temporary Order to Implement 2008 PA 295*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 290640, 2010 WL 4026100).) Similarly, the US District Court for the Western District of Michigan applied the same standard in denying an injunction to stay enforcement of a Commission order pending appeal that is directly comparable to the Commission's order in this case. *Michigan Bell Telephone Co v MFS Intelenet of Michigan*, 16 F Supp 2d 828 (WD Mich, 1998).

In the present case, the Commission found that AT&T failed to satisfy the four criteria that it has consistently used when evaluating motions to stay; indeed AT&T made no attempt to address the four criteria in its motion. The Commission recognized that "the only alleged injury that AT&T posits- concerning the financial viability of complainants- is entirely speculative." MPSC Order, February 12, 2015, pg. 5.

This Court enjoys the same latitude as the Commission when granting stays. The Commission appreciates that this Court may stay its order based on any terms this Court deems just. MCR 7.209(D). With that said, the Commission urges the Court to apply the four factors found in MCR 7.119(E). If it does so, the Court should arrive at the same conclusion the Commission did and deny AT&T's Motion for Stay Pending Appeal.

### A. No Irreparable Injury to AT&T

AT&T's contention of irreparable harm hinges on the assertion that the Federal Communications Commission ("FCC") will inevitably rule in its favor and this ruling will somehow negate the MPSC's decision. AT&T claims that if it wins at the federal level "there is a substantial risk that Westphalia and Great Lakes will simply pocket the proceeds from the MPSC Order, default on the federal orders, and thus never repay the amounts that would become due if AT&T Corp. prevails in this appeal." AT&T motion for stay, pg. 3. AT&T's statement is completely speculative.

The claim of irreparable injury must be both certain and great; it must be actual, and not merely theoretical. *Merrill Lynch Pierce Fenner & Smith, Inc v E F Hutton & Co, Inc*, 403 F Supp 336, 343 (ED Mich, 1975). Mere allegations of irreparable harm are insufficient. *Bates v City of Hastings*, 145 Mich 574, 583; 108 NW 1005 (1906). An injunction will not lie upon the mere apprehension of future injury or where threatened injury is speculative or conjectural. *Dunlap v City of Southfield*, 54 Mich App 398; 221 NW2d 237 (1974). *Warner v Central Trust Co*, 715 F2d 1121, 1123 (CA 6, 1983), *Jackson v Michigan State Democratic Party*, 593 F Supp 1033, 1047 (ED Mich 1984). Mere apprehension of future injury or damage is not an adequate basis for issuance of an injunction. *Fenestra Inc v Gulf American Land Corp*, 377 Mich 565; 141 NW2d 36 (1966). Economic injuries are not irreparable because they can be remedied by damages at law. *Thermatool Corp v Borzym,* 227 Mich App 366, 377; 575 NW2d 334 (1998). AT&T's assertions fail to satisfy the requirement of proving irreparable harm. On that basis alone, this Court should deny AT&T's motion for stay.

**B. AT&T Not Likely To Prevail**

AT&T has not advanced any novel reasons why it will prevail on appeal that it did not raise before the Commission. That is, except for their hope that the FCC will rule in its favor "as AT&T expects it will." AT&T motion for stay, pg. 1. AT&T believes that this will "conclusively confirm that the MPSC misread federal law, and it will mean that Westphalia and Great Lakes must refund some $12 million in interstate switched access charges to AT&T Corp." AT&T motion for stay, pg. 1.

Notice how AT&T used the term *interstate* as opposed to *intrastate.* This appeal arises out of a Commission case that dealt with intrastate charges. AT&T is well aware that interstate switched access service charges are governed by the FCC; intrastate charges are governed by the state regulatory body. 47 USC 152(b); 47 CFR 61.26; MCL 484.2310. Regardless of what happens at the FCC, AT&T lost on the merits before the MPSC and has only offered hypothetical- and very debatable- reasons why it might prevail before this Court. Even if this Court believes AT&T's claim that the FCC case may somehow impact this one, the mere possibility of success, rather than a strong showing of likelihood of success, on appeal is insufficient to satisfy this requirement. See *Michigan Bell Telephone Co v MFS Intelenet of Michigan*, 16 F Supp 2d 828 (WD Mich, 1998), citing *Mercy Health Services v 1199 Health & Human Services Employees Union*, 888 F Supp 828, 838 (WD Mich, 1995); *Ohio ex rel Celebrezze v Nuclear Regulatory Comm*, 812 F2d 288, 290 (6th Cir, 1987).

Moreover, AT&T's motion omits that this case first went to mediation prior to contested case hearings, and that the mediator's recommended settlement was, in all material respects, the same as the Commission's final order. AT&T's motion also fails to mention that the Commission's Staff – an independent, disinterested party in this case – largely supported WTC and GLC's positions in this case and opposed AT&T's positions in this case, and that the Commission's order in this case is consistent with the Staff's position. AT&T's position has been uniformly rejected

by all who have reviewed it, and AT&T has not offered any valid reasons why it will likely prevail on appeal.

### C. The Public Interest will be harmed by a stay.

If AT&T's motion is granted, a stay would seriously harm the public interest. AT&T unlawfully engaged in self-help by refusing to pay Complainants for intrastate switched access service for many years. The underlying proceeding before the Commission (which must conform to tight deadlines) has been going on for just under a year, and an appeal that moves through the Michigan Court of Appeals and the Michigan Supreme Court could take several years. A stay would send a strong message to long-distance providers that they are free to ignore lawful tariffs for years at a time with little or no consequences. The Commission also recognized that "GLC is a competitor of AT&T that was formed by the small, rural, independent incumbent local exchange carriers in order to provide an alternative to the larger carrier and its affiliates." MPSC Order, February 12, 2015, pg. 4. A stay of the Commission's order would signal that the anti-competitive self-help actions by AT&T in this case will be tolerated for years even after they were found to be unlawful. Such a result would be contrary to the public interest.

### D. A stay will harm GLC and WTC more than the absence of a stay will harm AT&T.

AT&T has not demonstrated harm that outweighs the harm to Complainants in the absence of a stay. AT&T argues a stay is necessary to prevent itself from being harmed and that Complainants will not be harmed if a stay is granted.

However, AT&T does not offer adequate proof of this position. AT&T, as the moving party, bears the burden of demonstrating the existence of each of the four prerequisites before injunctive relief may be granted. *Merrill Lynch Pierce Fenner & Smith, Inc v E F Hutton & C*o, Inc, 403 F Supp 336, 339 (ED Mich, 1975). Additionally, a stay is improper where its issuance would work a material harm to the non-moving party. *Bratton v DAIIE*, 120 Mich App 73, 79; 327 NW2d 396 (1982); *Gates v Detroit & Mackinac Railway Co*, 151 Mich 548, 552; 115 NW 420 (1908).

AT&T does not make the same argument here, but its motion for a stay before the Commission actually demonstrated why a stay would disproportionately harm the Complainants. AT&T boasted that "it has the size and financial resources to pay the amount in dispute if it does not prevail on appeal. Given its unquestioned ability to satisfy its obligations at the end of this litigation, if necessary, no bond should be required." MPSC Case No. U-17619, AT&T Motion for Stay Pending Appeal, pg. 2. Good for AT&T. It has only unlawfully failed to pay WTC and GLC in accordance with their lawful tariffs for intrastate access services since March 20, 2013. MPSC Order, January 27, 2015, pg. 36. If AT&T has the unquestioned ability to satisfy its obligations, it should step up and pay the $4.3 million as ordered by the Commission. This may not be a large amount of money to a conglomerate like AT&T, but WTC and GLC have waited almost two years to collect on this debt. This court should not force them to wait any longer.

## CONCLUSION AND RELIEF REQUESTED

This Court should deny AT&T's motion for stay. AT&T has not shown that it will suffer irreparable injury in the absence of the stay. As the Commission correctly noted, AT&T's theory of how the injury will come about is speculative and the alleged injury itself is remediable. Further, AT&T has not made a showing that it will prevail on the merits on appeal, let alone a strong showing. The public interest will be held harmed if a stay is granted. A stay would only embolden large interexchange carriers while limiting their competitors' viable remedies. Lastly, the Complainants stand to lose much more than AT&T if this stay is granted.

Justice does not require staying the Commission's January 27 order and AT&T's motion should be denied.

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326100/Answer to Motion for Stay

# ATTACHMENT

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

In the Matter of TEMPORARY ORDER TO IMPLEMENT 2008 PA 295.
The Association of Businesses Advocating Tariff Equity, Appellant,
v.
Michigan Public Service Commission, Consumers Energy Company, and Detroit Edison Company, Appellees.

Docket No. 290640. | Oct. 14, 2010.

MPSC; LC No. 00-015800.

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

**Opinion**

PER CURIAM.

***1** Appellant, The Association Of Businesses Advocating Tariff Equity (ABATE) [1], appeals as of right from certain portions of a December 4, 2008 temporary order of the Michigan Public Service Commission (PSC), designed to implement Michigan's Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1001 *et seq.* (Act). We affirm.

## I. Background

The Act became effective on October 6, 2008. MCL 460.1191 provided that the PSC was to issue a temporary order implementing the Act within sixty days of its passage. Among the Act's other provisions, subpart A required regulated electric utilities to adopt "renewable energy plans," in which the electric companies would be required to demonstrate how they would achieve compliance with the Act's requirements for obtaining electric capacity and energy production from "renewable energy resources" as defined in the Act. See MCL 460.1021 to MCL 460.1053. Subpart B of the Act requires, among other items, that regulated electric and natural gas providers adopt "energy optimization plans." Broadly speaking, an energy optimization plan is designed to reduce the demand for energy, and provide for load management, and thus reduce the future costs of providing service to customers, "[i]n particular ... to delay the need for constructing new electric generating facilities and thereby protect consumers from incurring the costs of such construction." MCL 460.1071(2). See also MCL 460.1001(2). Combination utilities, such as Consumers Energy Company (Consumers), are to adopt both electric and natural gas energy optimization plans. The Act provides companies with the option of enacting their own energy optimization plans, with PSC approval, MCL 460.1071 to MCL 460.1089, or of turning to an "energy optimization program administrator," a nonprofit organization selected by the PSC through a competitive bid process. MCL 460.1091. As discussed further below, certain electric customers could also opt to enact a self-directed energy optimization plan. MCL 460.1093. Also as further discussed below, gas or electric companies are permitted to recover certain costs for the energy optimization plans from their customers, MCL 460.1089; MCL 460.1091, while electrical customers who have a self-directed plan would be exempt from some of the utilities' plan costs. MCL 460.1093(1).

The PSC subsequently conducted meetings and discussions on the proposed order, and released its temporary order on December 4, 2008, [2] followed by amendatory orders on December 23, 2008 and January 13, 2009.

On January 2, 2009, ABATE filed a petition to intervene, coupled with a petition for rehearing or reconsideration. Among the issues raised, it challenged portions of the order designed to implement the energy optimization provisions of the Act, apparently in response to issues ABATE had raised in the earlier discussions. Specifically, ABATE challenged the PSC's finding that natural gas transportation customers would be subject to energy optimization plan surcharges of their transportation providers. ABATE also challenged the determination that the exemption in MCL 460.1093(1) for costs associated with utilities' energy optimization plans did not apply to costs associated with the natural gas energy optimization plans of electric customers who file self-directed electric energy optimization plans. In addition, ABATE challenged the imposition of rules providing for a ninety-day review period for the utilities' optimization plans, and the finding that companies who enact self-directed optimization

plans were to pay for the costs of their electric provider's review of the plan. In its subsequent order, the PSC denied ABATE's petition, after finding that its arguments were without merit. ABATE now appeals.

## II. Gas Transportation Customers' Inclusion in Provider Energy Optimization Plans

***2** ABATE first argues that the PSC erroneously interpreted MCL 460.1089(2) of the Act, and found that "transportation only customers" were "natural gas customers" subject to surcharges to fund programs in gas distribution utilities' energy optimization plans. It maintains that the PSC's decision runs contrary to the clear language of the statute and is thus unlawful. ABATE further maintains that these energy optimization plans will be useless to transportation only customers who do not purchase gas from the regulated utility.

### A. Interpretation of MCL 460.1089(2) [3]

> A final order of the PSC must be authorized by law and must be supported by competent, material and substantial evidence. Const 1963, art 6, § 28; *Attorney General v. Pub. Service Comm.*, 165 Mich.App 230, 235; 418 NW2d 660 (1987). All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed to be lawful and reasonable. MCL 462.25; see also *Michigan Consolidated Gas Co. v. Pub. Service Comm.*, 389 Mich. 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, an appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich. 396, 427; 596 NW2d 164 (1999).

In situations not involving the interpretation of a statute, a reviewing court should defer to the PSC's administrative expertise and not substitute its judgment for that of the PSC. *Attorney General v. Pub/ Service Comm. No. 2*, 237 Mich.App 82, 88; 602 NW2d 225 (1999). An agency's interpretation of a statute, while entitled to " 'respectful consideration,' " "is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 93, 103; 754 NW2d 259 (2008). [*In re Application of Consumers Energy Co.*, 281 Mich.App 352, 356-357; 761 NW2d 346 (2008).]

With regard to this Court's review of the PSC's factual determinations:

> Judicial review of administrative agency decisions must "not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views ." *Employment Relations Comm. v. Detroit Symphony Orchestra*, 393 Mich. 116, 124[; 223 NW2d 283] (1974); see also *In re Payne*, 444 Mich. 679, 692-693; [514 NW2d 121] (1994) ( "When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record."). [*In re Application of Detroit Edison Co.*, 483 Mich. 993; 764 NW2d 272 (2009).]

***3** When interpreting statutory language, this Court's primary goal is to give effect to the intent of the Legislature. "The first step is to review the language of the statute. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute." *Briggs Tax Serv., LLC v. Detroit Pub. Schools*, 485 Mich. 69, 76; 780 NW2d 753 (2010) (footnotes omitted). This Court accords to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning, or is defined in the statute. *Sun Valley Foods Co v. Ward*, 460 Mich. 230, 237; 596 NW2d 119 (1999); *Stocker v. TriMount/Bay Harbor Bldg. Co., Inc.*, 268 Mich.App 194, 199; 706 NW2d 878 (2005). See also MCL 8.3a; *Bay Co. Prosecutor v. Nugent*, 276 Mich.App 183, 189-190; 740 NW2d 678 (2007). Furthermore, statutory language is to be read in context, and "statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v. City of Lansing*, 486 Mich. 1, 15; 782 NW2d 171 (2010) (emphasis in original).

Under MCL 460.1089(1), a provider whose rates are regulated by the PSC is entitled to recover "the actual costs of implementing its approved energy optimization plan." [4] Pursuant to MCL 460.1089(2), the utility is entitled to recover those costs from customers:

> Under subsection (1), costs shall be recovered from *all natural gas customers* and from residential electric customers by volumetric charges, from all other metered electric customers by per-meter charges, and from unmetered electric customers by an appropriate charge, applied to utility bills as an itemized charge. [Emphasis added.]
>
> In the instant case, ABATE argues that individuals and entities who purchase only "transportation services" from the gas utility, i.e. natural gas transportation customers, are not "natural gas customers" of the utility and thus cannot be assessed the surcharge to fund the gas distribution utilities' energy optimization plans which ABATE maintains the "transportation only customers" cannot use.

The phrase "natural gas customers" is not specifically defined in the Act. The PSC noted this, but found that the Legislature intended the definition to include transportation customers. It based its decision on the fact that gas transportation customers were not explicitly excluded or distinguished in MCL 460.1089(1), that the transportation customers would receive benefits from inclusion in the providers' energy optimization plans, that the additional provisions of the Act include the revenues generated by sales to transportation customers, and that inclusion of these customers was consistent with the stated goals of the energy optimization provisions of the Act, as well as the stated goals of the Act itself.

Reading MCL 460.1089(2) in context with the other subsections of that statute, and in connection with the remaining provisions of the Act and the stated purpose of the Act in MCL 460.1001(2), *Robinson*, 486 Mich. at 15, we hold that the PSC correctly found that a portion of the natural gas providers' energy optimization plan costs could be charged back to the providers' gas transportation customers. Gas transportation customers take their service from the providers pursuant to PSC-approved terms and rate schedules. The services they are provided by the regulated utility are "natural gas" services. And in the absence of even an assertion to the contrary, we find no error in the PSC's finding that all of ABATE's members do purchase natural gas commodity, albeit from another provider. Thus, in light of the specific language that costs shall be recovered from "*all* natural gas customers" (emphasis added), the PSC's interpretation does not "conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Application of Consumers Energy Co.*, 281 Mich.App at 357.

***4** The language of MCL 460.1089(6), MCL 460.1089(7) and MCL 460.1091(1) provides further support for the PSC's decision. In pertinent part, MCL 460.1089(6) provides:

> The commission shall authorize a natural gas provider that spends a minimum of 0.5% of *total natural gas retail sales revenues, including natural gas commodity costs,* in a year on commission-approved energy optimization programs to implement a symmetrical revenue decoupling true-up mechanism that adjusts for sales volumes that are above or below the projected levels that were used to determine the revenue requirement authorized in the natural gas provider's most recent rate case. [Emphasis added.]

MCL 460.1089(7) provides in pertinent part:

> A natural gas provider or an electric provider shall not spend more than the following percentage of *total utility retail sales revenues, including electricity or natural gas commodity costs,* in any year to comply with the energy optimization performance standard without specific approval from the commission.... [Emphasis added.]

Similarly, MCL 460.1091(1) provides that, except for MCL 460.1089(6), the requirements under MCL 460.1071 through MCL 460.1089 do not apply "to a provider that pays the following percentage of *total utility sales revenues, including electricity or natural gas commodity costs,* each year to an independent energy optimization program administrator selected by the commission ..." (emphasis added).

We agree with the PSC's determination that these provisions support a finding that the Legislature intended to include natural gas transportation customers in the providers' energy optimization plans (either administered internally or run by the PSC's program administrator) and to count the transportation revenues for purposes of determining the size of the plans and the ability to implement the true-up mechanism. ABATE argues that Consumers' reading of the statutes improperly renders "including natural gas commodity

costs" or "including electricity or natural gas commodity costs" surplusage. However, it ignores the contrary argument that, if the Legislature intended the inclusion of only commodity costs, it would not have added the language concerning total sales, or total retail sales, revenue and that ABATE's interpretation would thus in turn improperly render this language surplusage. We do not find ABATE's argument persuasive. The language used in these sections indicates an intention by the Legislature that the provider is to include all of its utility sales revenues in its calculations. [5] Thus, the provider is to include the costs of the gas to direct customers, transportation sales to direct (or bundled) customers, and transportation sales to unbundled customers. While ABATE states that the question of what sales are to be included is not directly related to the question of which customers have to pay for the optimization plan costs, we disagree. The provider's costs are passed on to the customers under MCL 460.1089(2). And as ABATE repeatedly points out on appeal, an energy optimization plan is supposed to "[e]nsure, to the extent feasible, that charges collected from a particular customer rate class are spent on energy optimization programs for that rate class." MCL 460.1071(3)(d). Thus, when the provisions of the Act are viewed as a whole, the scope of an energy optimization plan is related to the Legislature's intention concerning which customers should be responsible for the costs of implementing the plan. [6]

***5** MCL 460.1089(5) further supports a finding that the Legislature intended to include gas transportation customers in the phrase "all natural gas customers." That statute provides:

> The established funding level for low income residential programs shall be provided from each customer rate class in proportion to that customer rate class's funding of the provider's total energy optimization programs. Charges shall be applied to distribution customers regardless of the source of their electricity or natural gas supply.

The inclusion of "distribution customers" in this subsection provides support for the PSC's conclusion that the Legislature was aware of the existence of gas transportation customers and intended them to be included in "all natural gas customers" in MCL 460.1089(2). In addition, this subsection further supports the PSC's interpretation because it ties the customers' funding of the low income residential programs in "proportion to that customer rate class's funding of the provider's total energy optimization programs." In other words, the distribution customers' funding responsibilities for low income residential programs are to be proportionate to the distribution customers' funding of the total energy optimization program. This indicates an intent by the Legislature that the distribution customers, or gas transportation customers, share funding responsibility for the provider's total energy optimization program, and are thus included as "all natural gas customers" for recovery of energy optimization plan surcharges. [7]

In addition, the PSC reasonably found that the inclusion of gas transportation customers in the energy optimization programs of their transportation providers would have results consistent with the intentions of the Act as stated in MCL 460.1001(2). While MCL 460.1071(2) describes the goals of the energy optimization portion of the Act primarily in terms of reduction of electric usage, and of reducing the need to build more electric generating facilities, ultimately the Act is designed to promote electrical and natural gas energy efficiency. See e.g. MCL 460.1071(3)(f) and (4)(a). While reducing the gas transportation customer's gas usage does not directly result in increased future service capacity for the transportation provider, it could have the effect of increasing the future service capacity of the provider who sells the transportation customer its natural gas. These presumably could include municipal providers, who are not subject to regulation by the PSC. See MCL 460 .6. A demand reduction in one of ABATE's member companies results in an increased ability for such a utility to meet customer's future demands without investment in costly infrastructure. This is at least consistent with the goal of MCL 460.1001(2)(b) to provide greater energy security through the use of indigenous energy resources. This finding refutes ABATE's implicit argument that the natural gas transportation customers' gas usage is not relevant to the goals of the Act or of the creation of energy optimization plans.

***6** For the above reasons, we hold that ABATE has not shown that the PSC's decision that natural gas transportation customers are responsible for energy optimization plan costs under MCL 460.1089(2) is unlawful or unreasonable.

### III. Exemption under MCL 460.1093(1)

ABATE next argues that the PSC erroneously construed the language of MCL 460.1093(1), when it determined that an

"eligible electric customer" could still be responsible for surcharges relating to the customer's natural gas provider's energy optimization plan, even if it filed a self-directed electrical energy optimization plan with its electric provider. We disagree.

As a counterpart to MCL 460.1089 and MCL 460.1091, MCL 460.1093 provides an opportunity for certain electric customers to file a self-directed electric optimization plan. MCL 460.1093(2) defines eligibility based on the peak demand of the customer's facility or facilities. MCL 460.1093(1), the subject of the instant dispute, provides for exemption of the requirements and responsibilities the customer would otherwise have under the energy optimization plan of its provider, or as ABATE argues providers, under MCL 460.1089, or the provider or providers' "independent energy optimization program administrator" under MCL 460.1091. MCL 460.1093(1) provides:

> An eligible primary or secondary electric customer is exempt from charges the customer would otherwise incur under section 89 or 91 if the customer files with its electric provider and implements a self-directed energy optimization plan as provided in this section.

At issue is whether an eligible electric customer, who files a self-directed energy optimization plan with its electric provider is exempt from the surcharges of only its electric provider under MCL 460.1089 or MCL 460.1091 or from both its gas and electric providers under those subsections.

The PSC found that the Legislature did not have this intent, holding that it was highly unlikely that the Legislature would have, in a section of the Act dealing explicitly with electric customers who file self-directed electric energy optimization plans, provided a loophole by which an electric sales customer who elects to do a self-directed electric program can avoid not only the electric surcharge, but also any gas surcharges assessed to gas sales customers. In holding that a customer is an electric customer only when purchasing electric service, the PSC determined that the charges referenced in MCL 460.1093(1) are therefore limited to charges for electric service that would otherwise be applicable.

We find the PSC's rationale persuasive. The phrase "is exempt from charges the customer would otherwise incur under section 89 or 91" is to be read in context with the remaining portions of MCL 460 .1093, as well as the remaining portions of the Act. *Robinson*, 486 Mich. at 15. The purpose of MCL 460.1089 and MCL 460.1091 is to provide alternative forms of provider-based energy optimization plans, and provide coverage for the cost of funding the plans. A self-directed energy plan obviates the need for the customer to participate in its electric provider's optimization plan, and effectively replaces it. See MCL 460.1093(7). [8] Thus, the "charges the customer would otherwise incur under [MCL 460.1089 or MCL 460.1091]" in this situation refers to the customer's electric optimization plan costs. Or, as stated by the PSC, a customer is an electric customer with respect to electric charges, and a gas customer with respect to gas charges.

***7** The PSC's decision that the Legislature did not intend MCL 460.1093(1) to exempt the customers who file a self-directed energy optimization plan from all surcharges, whether gas or electric-related, they would otherwise incur under MCL 460.1089 or MCL 460.1091 is further supported by the language of MCL 460.1093(4)(c). This provision, which also pertains to customers who file a self-directed energy optimization plan, requires the PSC to "[p]rovide a mechanism to cover the costs of the low income energy optimization program under [MCL 460.1089]." This program is found in MCL 460.1089(5), discussed above. Thus, reading MCL 460.1093(1) in conjunction with MCL 460.1093(4)(c), we conclude that the Legislature did not intend for the filing of an electric self-directed energy optimization plan to serve as a blanket exemption from all of the other surcharges in MCL 460.1089 or MCL 460.1091. Notably, ABATE does not challenge on appeal the PSC's imposition of the "cost associated with the allocated portion for the provider's low income residential energy optimization program" on self-directed optimization plan customers. Accordingly, reading the language of MCL 460.1093(1) as a whole in conjunction with the remainder of MCL 460.1093, and the other provisions of the Act, we hold that ABATE has failed to show that the PSC's decision was unlawful or unreasonable.

### IV. Issuance of a Stay

ABATE next maintains that the PSC erred when it refused to stay implementation of surcharges on transportation only customers until the issues could be more fully presented and addressed in a proceeding more formal than the one

below where there was no formal proceeding, hearing, or any presentation of oral or written argument in a written record. We disagree.

To obtain a stay from an administrative proceeding a party must establish certain criteria. MCR 7.105(G) provides in pertinent part:

> (1) The filing of a petition for review does not stay enforcement of the decision or order of which review is sought. The court may order a stay on appropriate terms and conditions only:
>
> (a) after hearing on the written motion for stay that is supported by affidavit and states with particularity the grounds therefor;
>
> (b) on finding:
>
> (i) that the applicant will suffer irreparable injury if a stay is not entered;
>
> (ii) that the applicant has made a strong showing that it is likely to prevail on the merits;
>
> (iii) that the public interest will not be harmed if a stay is granted; and
>
> (iv) that the harm to the applicant in the absence of a stay outweighs the harm to other parties to the proceedings if a stay is granted; ...

As noted, one of the prerequisites for obtaining injunctive relief such as the issuance of a stay is that the party will otherwise suffer irreparable harm. See e.g., *Royal Oak School Dist v. State Tenure Comm*, 367 Mich. 689, 693; 117 NW2d 181 (1962). ABATE has failed to plead or prove that such is the case here. As to this issue, in its motion for intervention and rehearing, ABATE argued in total:

> ***8** Alternatively, if the Commission does not reconsider its conclusions of law now, it should, at a minimum, stay implementation of surcharges on transportation only customers based on such important conclusions until the issues can be more fully presented and addressed than was the case in connection with the Commission's Temporary Order where there was no formal proceeding, hearing, or any presentation of oral or written argument in a written record. A stay will prevent substantial collections from the wrong customers and minimize the harm caused at this time.

This does not meet the requirement that ABATE demonstrate an irreparable injury. If the PSC's decision was reversed on appeal, the PSC could then order a rebate of any charges the customer has paid, or a corresponding rate decrease for the purchase of future gas transportation services, in a manner similar to a gas cost recovery reconciliation. See MCL 460.6h(13). This does not constitute irreparable injury. For harm to be irreparable, it must be "a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Thermatool Corp. v. Borzym*, 227 Mich.App 366, 377; 575 NW2d 334 (1998). "Economic injuries are not irreparable because they can be remedied by damages at law." *Id.* The PSC did not err when it refused to issue a stay of its temporary order.

### V. Ninety-Day Review Period

ABATE next maintains that the PSC's enactment of a ninety-day review period for provider's optimization plans violates the provisions of the Administrative Procedures Act for a full and complete hearing in rate cases, and also violates its due process rights under the Michigan Constitution. ABATE notes that, in its temporary order, the PSC admitted that the ninety-day timeframe is so tight that litigants cannot reasonably expect the full panoply of activities associated with the conduct of contested case proceedings at the PSC.

MCL 460.1021(5) provides:

> The commission shall conduct a contested case hearing on the proposed plan filed under subsection (2), pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24 .328. If a renewable energy generator files a petition to intervene in the contested case in the manner prescribed by the commission's rules for interventions generally, the commission shall grant the petition. Subject to subsections (6) and (10), after the hearing and within 90 days after the proposed

> plan is filed with the commission, the commission shall approve, with any changes consented to by the electric provider, or reject the plan.

As noted by ABATE, MCL 460.6a(1) provides in pertinent part that, in certain proceedings before the PSC, "the effect of which will be to increase the cost of services to [the gas or electric utility] customers," interested parties are entitled to notice and a "a reasonable opportunity for a full and complete hearing." Pursuant to MCL 460.6a(2)(a), a " '[f]ull and complete hearing' means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing."

***9** Here, even to the extent that ABATE is correct in its assertion that it, or other customers, are entitled to this procedure, it cannot show that the PSC's actions were improper. ABATE notes that our Supreme Court has held that the PSC should provide for a "full and complete hearing" to even procedures for interim rate relief, see *ABATE v. Mich. Public Service Comm.*, 430 Mich. 33, 36, 42-43; 420 NW2d 81 (1988), and argues that parties are entitled to these procedures in energy optimization plan proceedings. However, it ignores the Supreme Court's concurrent holding that, even in such a case, "[t]he PSC also retains discretion to define the standards upon which it bases a grant of interim relief, to define what issues and factors, in a given case, are relevant to those standards as opposed to the standards for final relief, and to limit evidence to the written form." *Id.* at 36. See also *id.* at 43-44. Thus, the PSC retains the ability to narrow the issues in rate optimization plan proceedings, and the relevant evidence, accordingly.

In its denial of ABATE's motion for rehearing or reconsideration, the PSC stated the Legislature intended to expedite energy optimization plan cases and thus only issues that are germane to the questions before the PSC should be entertained at the hearing. It further found that following the procedures set forth in the orders would not violate any party's rights because they provide for notice, opportunity for intervention, offering evidence, cross-examining evidence presented by others, and presenting arguments.

ABATE has not offered evidence to show that the PSC's decision was unreasonable or unlawful, or that it has failed to provide a reasonable opportunity for a full hearing in energy optimization plan cases. ABATE's argument minimizes the fact that the Legislature, not the PSC, set forth the ninety-day plan review timeframe here. Essentially, through the language of MCL 460.1021(5), the Legislature has determined that, as to the review of energy optimization or renewable energy plans, ninety days presents a "reasonable opportunity to present and cross examine evidence and present arguments relevant to the specific element or elements of the requests that are subject to the hearing" under MCL 460.6a(2). And while ABATE argues that the PSC improperly informed the Legislature that such a timeframe was feasible, or at least did not inform the Legislature that the timeframe would present a problem, it does not provide support for this assertion.

As to ABATE's claims that the ninety-day window violates customers' due process rights under the Michigan Constitution, ABATE cites solely to Const 1963, art 6, § 28. It provides no analysis of its claims that the Legislature's actions violated its members' constitutional rights and no case law to support its assertions. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v. Taylor*, 457 Mich. 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v. Detroit*, 355 Mich. 182, 203; 94 NW2d 388 (1959). "Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham*, 355 Mich. at 203.

***10** In addition, ABATE essentially seeks declaratory relief concerning an alleged due process violation that has not yet occurred. ABATE asserts that the ninety-day window is insufficient to present and cross-examine evidence, but has not demonstrated this to be the case by providing particulars concerning what, if any, evidence, testimony, argument or other matter it was not permitted to introduce or cross-examine in optimization plan cases as a result of the ninety-day period.

Moreover, the relief sought in this section of ABATE's brief has nothing to do with its allegations of due process violations. Instead, it seeks a legal finding that the language of MCL 460.1093(1) prevents gas and electric utilities from imposing surcharges on customers who implement self-directed energy optimization plans, which is essentially a reiteration of its legal arguments above. We thus hold that ABATE has failed to demonstrate that the PSC's decision to adopt procedures consistent with the time frame set forth in MCL 460.1021(5) was unreasonable or unlawful.

### VI. Cost for Provider Level Review of Self-Directed Plans

Noting that the PSC's temporary order contained a provision charging "review and evaluation" costs of self-directed energy optimization plans to the customers who implemented those plans, ABATE lastly argues that the PSC failed to acknowledge that MCL 460.1093(4)(b)-the provision that requires the imposition of these costs-does not apply to customers who are not subject to the requirements in MCL 460.1093(4)(a). ABATE maintains that this Court should reverse the PSC and remand with direction that the PSC modify its temporary order to make clear that customers not subject to MCL 460.1093(4)(a) are not to be charged such costs. We find such an order unnecessary at this time.

As noted above, pursuant to MCL 460.1093(1), customers who are eligible to file a self-directed energy optimization plan are exempt from surcharges the customer would otherwise incur from the development of the provider's energy optimization plan under MCL 460 .1089 or MCL 460.1091. However, at least some of those customers are still responsible for other charges, as listed in MCL 460.1093(4). MCL 460.1093(4) specifically provides:

> (4) The commission shall by order do all of the following:
>
> (a) Require a customer to utilize the services of an energy optimization service company to develop and implement a self-directed plan. This subdivision does not apply to a customer that had an annual peak demand in the preceding year of at least 2 megawatts at each site to be covered by the self-directed plan or 10 megawatts in the aggregate at all sites to be covered by the self-directed plan.
>
> (b) Provide a mechanism to recover from customers under subdivision (a) the costs for provider level review and evaluation.
>
> (c) Provide a mechanism to cover the costs of the low income energy optimization program under section 89.

In Attachment E to the PSC's order, the PSC incorporated these additional requirements to customers who are eligible to file a self-directed energy optimization plan. Pertinent to this appeal, the PSC ordered:

> ***11** j) The following are additional commission requirements under the self-directed energy optimization plan.
>
> i) All customers filing a self-directed energy optimization plan will be responsible for the cost associated with the allocated portion for the provider's low income residential energy optimization program. These costs will be determined in the provider's approved plan filing.
>
> ii) For all plan years beginning in 2011 or later, the cost to the customer for the provider's review and evaluation, and contribution to the low income energy optimization program will be proposed for approval by the commission in the electric provider's energy optimization plan filing.

ABATE challenges this requirement. In effect, ABATE argues that the PSC's order contains an "illegal" or "unreasonable" omission, because it does not specify that customers who do not have to comply with MCL 460.1093(4)(a), presumably because they have an annual peak demand of at least 2 megawatts at each site, or a total annual peak demand of at least 10 megawatts, also do not have to pay for the costs of provider level review and evaluation under MCL 460.1093(4)(b). [9]

Unlike ABATE's above claims of error, ABATE has not shown any error requiring present intervention by this Court. While presumably some of ABATE's members plan to file self-directed energy optimization plans, it has not shown which, if any, of its members would qualify for exemption from the assessment of provider level review costs, or whether any have been assessed such costs. Moreover, even were we to agree with ABATE's reading of MCL 460.1093(4)(b), the PSC's temporary order is not facially incompatible with this construction. It instead directs providers to submit proposed contributions to the low income energy optimization program and proposed costs for the providers' review and evaluation. Unlike the immediately preceding section of the PSC's order in Attachment E, nothing in this section actually requires or imposes these costs on the self-directed optimization plan electrical customer. Presumably, when these costs are proposed for the PSC's review, they will properly comport to the language of MCL 460.1093(4). ABATE has not shown that the PSC acted illegally or unreasonably here.

Affirmed.

**Parallel Citations**

Util. L. Rep. P 27,117

Footnotes

1 ABATE describes itself as "a voluntary association of large industrial businesses which are located in and doing business in the State of Michigan." According to its filing:

> Members of ABATE consume substantial quantities of electricity and natural gas and in Michigan alone their combined gas and electric bills exceed $1.2 billion annually. In addition, ABATE members are also transportation service only customers relating to energy.

2 According to the temporary order, the order was to last only for a year while the PSC promulgated administrative rules to administer the Act in PSC Docket No. U-15900. However, to date, the PSC has proposed a number of rules to administer the Act and is in the process of seeking public comment. Order, U-15900, 4/27/10.

3 We reject the challenge to ABATE's standing. The PSC had discretion to allow intervention, R 460.17201 and R 460.17205 and effectively granted permissive intervention.

4 Some caveats apply for costs that exceed the overall funding levels specified in the plan, and "costs for load management" are not recoverable under this section.

5 While the Act does not define "retail" sale, ABATE does not argue that a sale of transportation services does not constitute a retail sale, nor does it explain what such a sale would otherwise be. In addition, because the language of MCL 460.1091 does not use the phrase "retail" but includes the same percentages of revenue as those included in MCL 460.1089(7), and the sales of transportation services are to end user customers, we conclude that these services are intended to be viewed as retail sales.

6 A similar conclusion could be made regarding the savings targets outlined in MCL 460.1077. The PSC's December 23, 2008 order clarified that these targets include sales volumes that include both choice and transportation sales volumes.

7 With regard to ABATE's argument that it will not be able to participate in any of the benefit programs, Consumers correctly notes that ABATE acknowledges that gas transportation customers will be eligible to participate in and receive benefits from the energy optimization programs developed by the utilities, a fact that the PSC recognized in its order. ABATE's assertion as to the amount of the benefits its members will receive, and whether these benefits would run afoul of the requirements in MCL 460.1071(3)(d), is speculative.

8 This section provides:

> Once a customer begins to implement a self-directed plan at a site covered by the self-directed plan, that site is exempt from energy optimization program charges under section 89 or 91 and is not eligible to participate in the relevant electric provider's energy optimization programs.

9 As noted above, ABATE does not challenge the imposition of costs for implementing the low income energy optimization programs under MCL 460.1093(4)(c) and MCL 460.1089(5).